Case No. 20-CV-315

In the
DISTRICT OF COLUMBIA
COURT OF APPEALS

DUPONT EAST CIVIC ACTION ASSOCIATION, *et al.,*

Appellants,

v.

MURIEL BOWSER, *et al.,*

Appellees.

Appeal from the Superior Court of the District of Columbia in Case No. CAB4130-19 (Hon. Yvonne Williams, Judge)

BRIEF FOR APPELLANTS

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STATEMENT PURSUANT TO RULE 28(a)(2)

Parties

The parties to this appeal are the following: Appellants are Dupont East Civic Action Association, Nicholas DelleDonne, and Rachel Dubin. Appellees are Muriel Bowser, in her official capacity as Mayor of the District of Columbia, David Maloney, in his official capacity as the District of Columbia State Historic Preservation Officer, Andrew Trueblood, in his official capacity as Director of the Office of Planning, and Marnique Heath, in her official capacity as Chair of the Historic Preservation Review Board.

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STATEMENT PURSUANT TO RULE 26.1

Pursuant to Rule 26.1 of the Rules of the District of Columbia Court of Appeals, Dupont East Civic Action Association ("DECAA") makes the following disclosures: DECAA has no parent companies and no publicly-held company has a 10% or greater interest in DECAA.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

I. JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the Superior Court of the District of Columbia that disposed of all the parties' claims by dismissing the Complaint without prejudice.

II. STATEMENT OF THE ISSUES

1. Whether the trial court erred in granting the motion of Defendants/Appellees (collectively, the "District") to dismiss the constitutional claims ("Constitutional Claims")[1] of Appellants' (collectively, "Dupont East Citizens") on the grounds that: (i) it had no subject matter jurisdiction, such jurisdiction residing in the Historic Preservation Review Board ("HPRB") and then the Mayor's Agent; (ii) Dupont East Citizens had not exhausted their administrative remedies by seeking review before the Mayor's Agent; and (iii) primary jurisdiction resided in the HPRB, when, among other things:

A. The Superior Court, as a court of general jurisdiction, has subject matter jurisdiction over such Constitutional Claims;

[1] *See* Compl. Third Claim (alleging violation of Dupont East Citizens' due process rights to an unbiased decision-maker) (Appendix ("App.") A0036); Fourth Claim (alleging violation of Dupont East Citizens' due process right to adequate notice and hearing) (App. A-0038); Fifth Claim (alleging violation of Dupont East Citizens' due process right not to be subject to retroactive orders) (App. A0039); and Sixth Claim (alleging violation of Dupont East Citizens' Fifth Amendment right to equal protection of the laws) (App. A0040).

B. There is no exhaustion requirement because the Mayor's Agent (as well as the HPRB) has limited jurisdiction that does not include jurisdiction to adjudicate the Constitutional Claims;

C. Neither the HPRB (nor the Mayor's Agent) has primary jurisdiction over such Constitutional Claims and indeed, due to their limited jurisdiction, they have no jurisdiction at all to adjudicate these Constitutional Claims; and

D. Even if primary jurisdiction were applicable, the Superior Court should have stayed the case, rather than dismissed it.

2. Whether the trial court erred by granting the District's motion to dismiss Dupont East Citizens' First Claim (seeking a declaratory judgment that the site of the Temple Landmark is Lot 820), Seventh Claim (alleging the District's adoption of Lot 800 as the Temple Landmark Site was arbitrary and capricious), and Eight Claim (alleging that the District's rejection of the petition of Appellant Dupont East Citizens Association ("DECAA") to extent the boundaries of the Temple Landmark was arbitrary and capricious) on the grounds that: (i) it had no subject matter jurisdiction, such jurisdiction residing in the HPRB and then the Mayor's Agent; (ii) Dupont East Citizens had not exhausted their administrative remedies by seeking review before the Mayor's Agent; and (iii) primary jurisdiction resided in the HPRB, when, among other things:

A. The Superior Court, as a court of general jurisdiction, has subject matter jurisdiction over these claims;

B. To the extent any exhaustion or primary jurisdiction requirement before the HPRB existed, Dupont East Citizens fully met those requirements by: (i) repeatedly challenging the HPRB's boundary determination that the Temple Landmark Site was Lot 800; (ii) petitioning the HRPB to extend the boundaries of the Temple Landmark Site, and (iii) challenging in the Complaint the HPRB proceedings, which HPRB proceedings were complete before the trial court dismissed the case;

C. The Mayor's Agent has no jurisdiction to adjudicate HPRB boundary determinations and indeed refused to consider such issues at the Mayor's Agent Hearing, and thus there existed no exhaustion or primary jurisdiction requirement before the Mayor's Agent; and

D. Even if primary jurisdiction were applicable, the Superior Court should have stayed the case, rather than dismissed it.

3. Whether the trial court erred by granting the District's motion to dismiss Dupont East Citizens' Second Claim (alleging various violations of the Historic Landmark and Historic District Protection Act of 1978, D.C. Code § 6-1101 *et seq.* ("Preservation Act" or "Act") and accompanying regulations on

the grounds that: (i) it had no subject matter jurisdiction, such jurisdiction residing in the HPRB and then the Mayor's Agent; (ii) Dupont East Citizens had not exhausted their administrative remedies by seeking review before the Mayor's Agent; and (iii) primary jurisdiction resided in the HPRB, when, among other things:

A. The Superior Court, as a court of general jurisdiction, has subject matter jurisdiction over these claims;

B. To the extent any exhaustion or primary jurisdiction requirement before the HPRB existed, Dupont East Citizens fully met that requiring by repeatedly asserting these challenges at the HPRB;

C. The Mayor's Agent has no jurisdiction to adjudicate the claims and indeed refused to consider such issues at the Mayor's Agent Hearing, and thus there existed no exhaustion or primary jurisdiction requirement before the Mayor's Agent; and

D. Even if primary jurisdiction were applicable, the Superior Court should have stayed the case, rather than dismissed it.

4. Whether the trial court erred by granting the District's motion to dismiss Dupont East Citizens' Ninth Claim (alleging that the HPRB's approval of the conceptual design was arbitrary and capricious) on the grounds that: (i) it had no subject matter jurisdiction, such jurisdiction residing in the HPRB and then the

Mayor's Agent; (ii) Dupont East Citizens had not exhausted their administrative remedies by seeking review before the Mayor's Agent; and (iii) primary jurisdiction resided in the HPRB, when, among other things:

A. The Superior Court, as a court of general jurisdiction, has subject matter jurisdiction over these claims;

B. To the extent any exhaustion or primary jurisdiction requirement before the HPRB existed, Dupont East Citizens fully met that requirement by repeatedly challenging that determination before the HPRB;

C. No exhaustion or primary jurisdiction requirement existed with respect to the Mayor's Agent because the Preservation Act provides that the Mayor's Agent has no jurisdiction to review HPRB conceptual design determinations and indeed refused to consider such issues at the Mayor's Agent Hearing; and

C. Even if primary jurisdiction were applicable, the Superior Court should have stayed the case, rather than dismissed it.

III. STATEMENT OF THE CASE

On June 28, 2019, Dupont East Citizens filed their Complaint in Superior Court. They asserted a total nine causes of action (four of which were constitutional), as follows:

Constitutional Claims

- Third Claim (alleging violation of Dupont East Citizens' due process rights to an unbiased decision-maker) (App. A0036);
- Fourth Claim (alleging violation of Dupont East Citizens' due process right to adequate notice and hearing) (App. A0038);
- Fifth Claim (alleging violation of Dupont East Citizens' due process right not to be subject to retroactive orders) (App. A0039); and
- Sixth Claim (alleging violation of Dupont East Citizens' Fifth Amendment right to equal protection of the laws) (App. A0040).

Declaratory Judgment Claim

- First Claim (seeking a declaratory judgment that the Site of the Temple Landmark Is Lot 820) (App. A0033).

Statutory and Regulatory Violations

- Second Claim (alleging various violations of the Preservation Act and Preservation Regulations) (App. A0035).

Arbitrary and Capricious Claims

- Seventh Claim (alleging the District's adoption of the no longer extant Lot 800 as the Temple Landmark Site was arbitrary and capricious) (App. A0041).

- Eighth Claim (alleging that the District's rejection of the petition to extend the Temple Landmark boundaries was arbitrary and capricious) (App. A0045).
- Ninth Claim (alleging that the HPRB's approval of the conceptual design was arbitrary and capricious) (App. A0047).

On September 9, 2019, the District moved to dismiss the Complaint on various grounds. App. A0160. Likewise on September 9, 2019, the District filed a motion to stay discovery and for a protective order, which the Court denied on September 27, 2019. App. A0004-05. The parties engaged in discovery. Dupont East Citizens', among other things; took 5 depositions; posed 26 interrogatories; requested 54 categories of documents; and propounded 62 requests for admission. They also responded to 15 requests for admission, 30 interrogatories, and 45 document requests. App. A0007.

The Mayor's Agent held a hearing on February 7, 2020. App. A0301-302. Pursuant to his limited authority, the Mayor's Agent addressed only the HPRB's determination that the subdivision met the requisite "necessary in the public interest" standard under the Preservation Act, the sole issue within the jurisdiction of the Mayor's Agent. *See id*; D.C. Code § 6-1106(e).

On February 28, 2020, Dupont East Citizens and the District jointly moved the Court to stay the deadline for the filing of motions that had been set for March

9, 2020, until thirty (30) days after the Court's ruling on the pending Dupont East Citizens' Motion for Extension of Time for Discovery and Dupont East Citizens' Motion to Compel Defendants To Provide Discovery Responses. App. A0007.

On March 2, 2020, the trial court issued an order ("Order") granting the District's motion to dismiss. App. A0304. Despite Dupont East Citizens' constitutional, statutory interpretation, and administrative law claims, the trial court apparently concluded that it had no subject matter jurisdiction, that Dupont East Citizens had not exhausted their administrative remedies, and that primary jurisdiction over their claims resided elsewhere. This appeal ensued.

It bears noting that the basis of the trial court's Order is unclear in two respects. *First*, the Order's wording suggests that the trial court dismissed the Complaint on the grounds that primary jurisdiction resided in the HPRB, even though the HPRB proceedings challenged in the Complaint had been completed at the time the trial court issued its Order. *See* Order at 9 (App. A0312) (resolution required "specialized expertise of the HPRB . . . As such, the Court finds that it does not have primary jurisdiction to hear the matter.") However, out of a surfeit of caution, Dupont East Citizens also address whether primary jurisdiction resided in the Mayor's Agent. *Second,* the trial court ruled that "Plaintiffs have not exhausted their administrative remedies by seeking review before the Mayor's Agent and then petitioning the District of Columbia Court of Appeals" (Order at

10) (App. A0313), even though the trial court had previously concluded that primary jurisdiction resided in the HPRB (but apparently not the Mayor's Agent). Again, out of a surfeit of caution, Dupont East Citizens also address the absence of any exhaustion requirement before the HPRB.

IV. STATEMENT OF FACTS[2]

A. Introduction

This lawsuit challenges the improper and legally unsupportable conduct of the Appellees (collectively, the "District") in connection with the District's approval of a project to develop a five-story glass and brick luxury apartment building ("Luxury Project" or "Project") on the site of one of the District of Columbia's most renowned historic landmarks, the Masonic Temple, located at 16th and S Streets, N.W., in the middle of the Sixteenth Street and Fourteenth Street Historic Districts. The Luxury Project would entirely destroy the Temple Gardens (the area currently extending from the rear of the Temple to 15 Street);

[2] While ordinarily a trial court accepts as true the facts set forth in a complaint, in the instant case, the trial court opined that, since it concluded that it was ruling upon a Rule 12(b)(1) issue, that it was "'free to weigh the evidence without any presumption regarding [the complaint's] truthfulness.'" Order at 6 (citation omitted) (App. A0309). The trial court similarly concluded that it could thus look "to matters outside of the pleadings." *Id.* While Dupont East Citizens disagree with these contentions (*see infra* Section IV.A, Standard of Review), given the trial court's conclusion, they have in certain instances pointed to evidence obtained during discovery that verify the Complaint's allegations. Should this Court also decide to look outside the pleadings, Dupont East Citizens respectfully request that this Court take this additional evidence into consideration and grant Dupont East Citizens the right to submit the additional evidentiary materials referenced herein.

despoil the aesthetic interests of Appellants ("Dupont East Citizens") and others who enjoy the Temple Gardens and the view of the historic Temple from the surrounding area; result in a significant decrease in the value of Appellant Dupont East Citizens Action Association ("DECAA") members' property values; deprive the homes of DECAA members living across S Street of light; and permit a structure wholly incompatible with the historic districts in which the Project would reside. Compl. ¶ 1 (App. A0011-12).

The Complaint alleges that the District, and in particular the HPRB and the Historic Preservation Office ("HPO") (HPRB's advisor agency), in pandering to the Luxury Project's developer, Perseus TDC:

- violated Dupont East Citizens' due process rights by failing to provide notice of intent to establish the Temple Landmark Site boundary (Compl. ¶¶ 95-102) (App. A0038) (Fourth Claim);

- violated Dupont East Citizens' due process right to unbiased consideration by assigning as the HPO official in charge of evaluating the Luxury Project an individual *who lived in a house directly across the street* from it[3] and accepting testimony and input in favor of the Project from an ANC Commissioner whose employer worked for the developer *on the very same Project* (Compl. ¶¶ 85-94) (App. A0036-38) (Third Claim);

- violated Dupont East Citizens' right to equal protection of the laws by unfairly applying the Historic Landmark and Historic District Protection Act of 1978 ("Preservation Act" or "Act"), D.C. Code § 6-1101 *et seq.,* to them in a manner different than it applied that Act

[3] Discovery showed that the HPO official's house in question is worth more than $1,000,000. Deposition of Steve Callcott dated January 27, 2019 ("Callcott Dep.") at 241.

to others similarly situated (Compl. ¶¶ 109-116) (App. A0040-41) (Sixth Claim);

- recognized in a formal report dated April 30, 2019 ("April 30 HPO Report") that the "site" of the Temple under the Act encompassed approximately half of the area that the Luxury Project was to occupy, thereby precluding the Project, which could not meet the standards for the necessary subdivision of this landmark site and in any event would require a public hearing before the Mayor's Agent subject to the DC Administrative Procedure Act ("DCAPA") requirements. Ten days later, the HPO, after the developer's intervention, in derogation of its duties and kowtowing to the developer, completely reversed its position on the Temple Landmark Site boundaries after it was advised that the Project could not proceed under that interpretation, and reduced the Temple site's boundaries *so the Project's footprint would not be on a landmark site* (Compl. ¶¶ 40-43,70-79, 117-124) (App. A0023-26, A0033-34, A0041-44) (First and Seventh Claims);

- through the same gambit of reducing the Project's footprint so it would not be on a landmark site, engaged in a brazen attempt to deprive Dupont East Citizens and others of their statutory due process right to a hearing before the Mayor's Agent subject to DCAPA procedural protections. A public hearing is required only if there is a subdivision of an *historic landmark*, as opposed to "subdivision of a lot in an historic district." D.C. Code § 1106(c). Compl. ¶¶ 6, 80-94 (App. A0013-14, A0035-38) (Second and Third Claims);

- embraced an absurd interpretation of the Preservation Act (that it had never previously adopted and contrary to the standards it said it followed) that the site of Temple Landmark was the lot upon which the Landmark had originally been constructed, here the no longer extant Lot 800. That interpretation will create havoc in applying the Act in future cases by ignoring scores of intervening years between the construction of a landmark and its entry into the DC Inventory of Historic Sites ("DC Inventory") (established in 1978 by the Act), which triggers the Act's protections (Compl. ¶¶ 117-135) (App. A0041-44) (Seventh Claim); and

- violated virtually every administrative law procedural principle enshrined in the DCAPA, including the requirement to examine the relevant factors, to provide a cogent and rational explanation for their action, and to explain any change of course (Compl. ¶¶ 117-141) (App. A0041-50) (Seventh, Eighth, and Ninth Claims).

B. Background of the Temple.

In May 1911, the Masons broke ground on construction of the Temple. Architect John Russell Pope, who also was the architect for such notable buildings as the Jefferson Memorial and the National Archives, designed the Temple and modeled it after the tomb of Mausolus at Halicarnassus, one of the Seven Wonders of the Ancient World. Compl. ¶ 20 (App. A0017).[4]

The building was dedicated four years later on October 18, 1915. Its stately grandeur has graced this city for over 100 years. Contemporary architects widely praised the building's design.[5] According to the HPO, it is "among the grandest expressions of the formal classicism that typified the City Beautiful movement in Washington in the early 20th century." Nov. 29 HPO Rep. at 1 (App. A0200). The

[4] *See* Defs.' Ex. 2 to Motion to Dismiss (HPO Report dated November 29, 2018 ("November 29 HPO Rep.")) at 1 (App. A0200); Compl. Ex 2 (HPO Report dated April 30, 2019 ("April 30 HPO Rep.")), at 2 (App. A0061).

[5] It won Pope the Gold Medal of the Architectural League of New York in 1917. French architect Jacques Gréber described it as "a monument of remarkable sumptuousness[.]" Fiske Kimball's 1928 book *American Architecture* describes it as "an example of the triumph of classical form in America." In the 1920s, a panel of architects named it "one of the three best public buildings" in the United States. In 1932, it was ranked as one of the ten top buildings in the country in a poll of federal government architects. Compl. ¶ 21 (App. A0017-18).

rear apse of the Temple, pictured below, is an important architectural feature of the Temple, portrayed in architectural and design articles regarding the Temple[6] and an obvious contributing element to the Temple's beauty. Compl. ¶¶ 21-22 (App. A0017-18).

In 1915, when the Temple's construction was completed, there were two- and three-story row houses in the area behind the Temple, but they left the view of the apse unobstructed. Beginning in 1920, and continuing for six or seven decades thereafter, the Masons acquired all the numerous lots on S Street and 15th Street in the area between the rear of the Temple building and 15th Street. Rather than rent these properties, instead the Masons systematically demolished the row houses, which was completed "prior to the site being protected as part of the historic district" in 1979 when the Preservation Act became effective. Nov. 29 HPO Rep. at 1 (App. A0200). For over 20 years, from 1990 to 2011, the Temple Garden area

[6] *See*, *e.g.*, https://en.wikipedia.org/wiki/House_of_the_Temple

was a community garden under an agreement between the Masons and the District of Columbia Government. Compl. ¶ 23 (App. A0018).[7]

C. Congressional Action and Recognition of the Temple Landmark Site.

Congressional Private Act 92-23 (Compl. Ex. 6) (App. A0111) provides that the area described therein "shall be exempt from taxation by the District of Columbia so long as that property is owned by the Supreme Council and *is used in carrying on its purposes and activities and is not used for any commercial purposes*." Private Act 92-23 (emphasis added). The area so described in this 1971, which extends the Temple site subject to the tax exemption approximately 100 feet behind the Temple, is the same area denoted in the April 30 HPO Report as the Temple Landmark Site boundaries. Congress' provision of such tax exemption to the Temple Landmark Site establishes that Congress itself likewise viewed that area shown within the red boundary lines in the April 30 HPO Report to be the site of the Temple Landmark. Compl. ¶¶ 25-26 (App. A0019-20).[8]

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[7] *See also* Apr. 30 HPO Rep. at 3 (App. A0062); Compl. Ex. 4 (HPO Report dated May 10, 2019 ("May 10 HPO Report")) at 4 (App. A0105).

[8] In addition, in the 1896 Incorporation Act, Congress limited the real estate that the Masons could hold to that which "shall be necessary and proper for the promotion of the fraternal and benevolent purposes of said corporation, which shall not be divided among the members of the corporation, but shall descend to their successors for the promotion of the objects aforesaid." Thus, the Masons were and are precluded from owning property that is "not necessary and proper for the promotion of the fraternal and benevolent purposes of said corporation." Compl. ¶ 24 (App. A0019).

Thus, the Temple has had the benefit of the tax exemption since at least 1971 (a period of almost 50 years), including for the area extending 100 feet eastwards towards 15th Street from the rear of the Temple building itself. This fact establishes that this area to the east of the Temple was historically related to the Temple (a factor in determining the Temple Landmark boundaries) because it was being "used in carrying on its purposes and activities." Further, the Masons themselves denoted the Temple Landmark Site (as determined in the April 30 HPO Report) as the "Main Temple Site" in a filing with the DC Government Land Records with respect to an application to close an alley abutting the Temple. Compl. Ex. 7 (App. A0114).

In 1976, prior to the Act's passage, Lot 820 was created. It encompassed all the land from 16th Street to approximately 100 feet east of the rear of the Temple building. Lot 820 is the same parcel that Congress declared tax exempt in 1971 in Private Act 92-23 and the same area that the April 30 HPO Report determined was the Temple Landmark Site. Compl. ¶ 28 (App. A0020).

D. Designation of Lot 820 as the Temple Landmark Site by the Joint Commission (HPRB's Predecessor) in the Sixteenth Street Historic District Proceeding.

The designated eastern boundary for the Sixteenth Street Historic District provides further evidence that Lot 820, the same area that the April 30 HPO Report identified as the eastern boundary for the Temple Landmark Site, was correct.

Concurrent with the passage of the Act in 1978, a number of historic districts were created, one of which was the Sixteenth Street Historic District. The application for the Sixteenth Street Historic District states that only lots fronting on 16th Street are to be included. No lot could be part of the Sixteenth Street Historic District which was not on 16th Street. Compl. ¶ 29 (App. A0020-21).

The Joint Commission (the HPRB's predecessor) adopted as the eastern boundary of the Temple Landmark lot incorporated in the Sixteenth Street Historic District the same eastern boundary lot line later identified in the April 30 HPO Report, which is Lot 820. If the boundary of the lot on which the Temple had sat in 1978 had been the line less than 6 feet behind the Temple apse (Lot 800) (as the May 10 HPO Report proposed), then the Sixteenth Street Historic District, a linear district that by definition only included sites fronting 16th Street, would have gone no farther than that line. The fact that the eastern boundary of the Sixteenth Street Historic District is the same as the April 30 HPO Report's determination of the eastern boundary (i.e., Lot 820) shows that in 1978 that the area enclosed within the red boundary lines in the April 30 HPO Report was the lot upon which the Temple sat and was and is the correct site of the Temple Landmark. Compl. ¶¶ 30-31 (App. A0021).

E. The District Improperly Approved the Luxury Project's Conceptual Design.

The Masons hired Perseus TDC ("Perseus") to develop the open space to the east of the Temple. Compl. ¶ 2 (App. A0012). Perseus proposed to build a 150 unit Luxury Project that was completely incompatible with the neighborhood. Among other things:

- the Luxury Project is far too massive for the neighborhood;
- "[o]nce a new building is massed on the site, "the back of the [T]emple will no longer be visible from most public vantage points" (Nov. 29 HPO Rep. at 3) (App. A0202), and the Luxury Project's 5 stories will block the sun from residences on S Street; and
- unlike any building in the area, the Luxury Project would have sub-cellar units requiring a ditch 5 feet wide and 15 feet deep surrounding the building, and residents would have to descend 25 steps below ground to reach the doors of their living units.

Compl. ¶ 136 (App. A0048).

Further, the HPO and HPRB's procedural consideration of the conceptual design was flawed in numerous respects. Compl. ¶¶ 137 (App. A0048-50). Among other things, the HPO Report that formed the basis of the HPRB's approval mistakenly opined that the area to the east of the Temple "was historically unrelated to the [T]emple," even though the Masons had owned

the property to the east of the Temple for over 90 years and had received a tax deduction for that area that was permissible only if the property was used for the Temple's purposes and activities. *Id.*

F. The HPRB Failed To Provide Proper Notice of the Boundary Reduction Hearing.

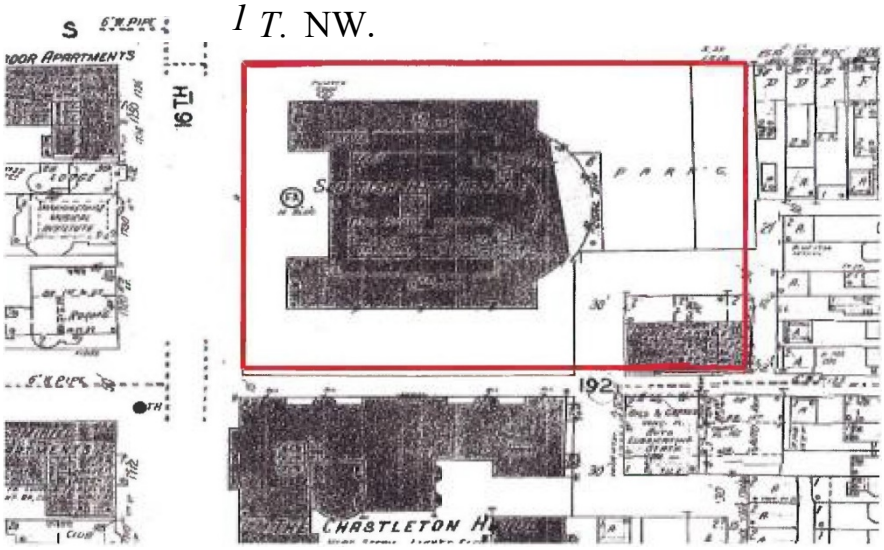
On or about March 8, 2019, DECAA submitted a petition (Compl. Ex. 8) (App. A0116), to have the boundaries of the Temple Landmark Site extended to cover the area east to 15th Street. In its notice dated May 8, 2019 for the May 23 hearing (Compl. Ex. 9) (App. A0155), the HPRB described the two cases to be considered as "Scottish Rite Temple amendment (boundary increase), 1733 16th Street NW, Case 19-06 [sic]" and "Scottish Rite Temple, 1733 16th Street NW, HPA 18-668, concept/four-story plus penthouse new apartment building (*Callcott*)." Compl. ¶¶ 35-38 (App. A0022).

The District wholly failed to provide any notice, let alone adequate notice, of their intent to reduce the boundary of the Temple Landmark Site. Indeed, the whole Luxury Project depends on the subdivision of the existing landmarked site. But, no notice whatsoever was given to the public that the District would consider a reduction and elimination of a substantial part of an existing historic landmark that the HPO had determined existed as of April 30, 2019. *See* Compl. Ex. 9 (App. A0155).

G. The HPO Panders to the Developer and Improperly Changes the Boundary of the Temple Landmark Site.

In response to DECAA's petition to designate the entire area east of the Temple Landmark Site to 15th Street as an historic landmark, the HPO issued the April 30 HPO Report. The HPO recommended that the HPRB reject that petition, but in the process it nonetheless identified the boundaries of the current Historic Landmark Designation of the Temple area as follows:

> Under the D.C. Preservation Law adopted in 1978, the new legal protections for a historic landmark extend to the building and its site, commonly interpreted as the lot where the building is situated. At the time of its designation, the temple sat on the lot [Assessment and Taxation Lot 820] shown in red outline below. The landmark boundaries of the Scottish Rite Temple include approximately 2/3 of present-day Lot 108 in Square 192. . . . [T]he landmark boundaries comprised the Scottish Rite Temple building itself; a carriage house/garage complex located at the southeast (rear) of the property (Old Lot 808); and open space to the east (in part historically occupied by rowhouses).



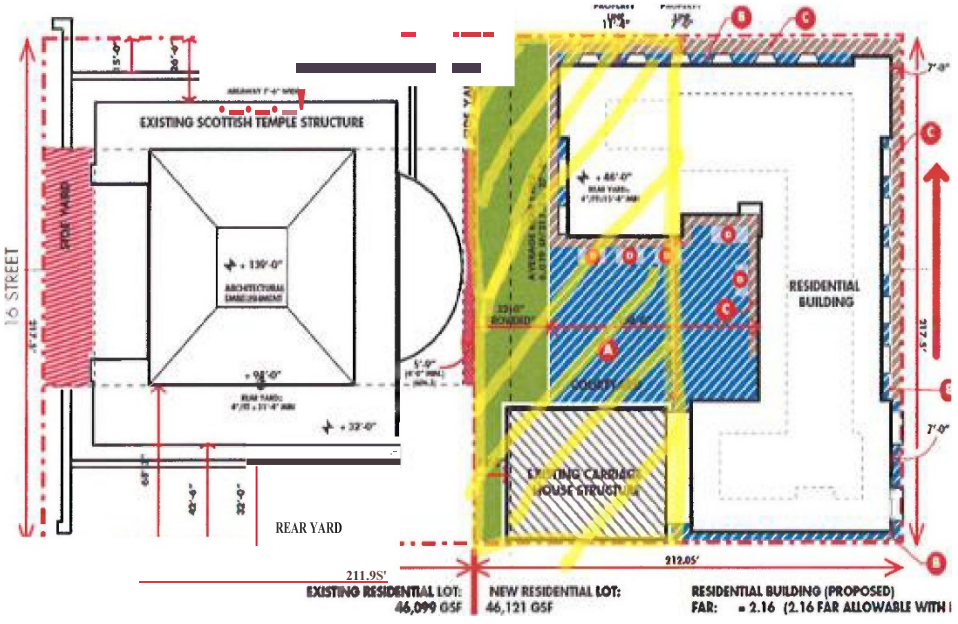
1959 Sanborn Map showing landmark boundary overlay

> These boundaries included the original lots which the Scottish Rite purchased in 1910 to build its temple, as well as additional adjacent lots it purchased in the decades after completion of the temple (1915) until the time that boundaries were established for the 16th Street Historic District (1977).
>
> The landmark boundary follows the eastern edge of the 16th Street Historic District.

Compl. ¶ 40 (App. A0023-24); Apr. 30 HPO Rep. at 1-2 (Compl Ex. 2) (App. A0060).

On May 6, 2019, a submission was made to the HPRB in connection with the upcoming May 23, 2019 hearing (Compl. Ex. 3) (App. A0067) ("May 6 Submission"). In demonstrating that the HPRB could not approve the Project in light of the HPO's April 30 finding, the May 6 Submission stated:

> Set forth below in yellow cross markings is a superposition of the portion of the proposed Luxury Project that is intended to be built inside the boundaries of the present landmarked site:



> Perseus proposes to subdivide the existing Landmark, removing the area in yellow from the Landmark designation so that its project can proceed. The Masons must subdivide because the Act of Congress (Private Law 92-23) that gave the Masons tax exempt status for the site extends only as long as the property is used for non-profit purposes. Hence, the necessity of subdividing the lot into non-profit uses and profit making uses.
>
> As set forth below, Perseus has not even attempted to meet the requisite statutory requirements for subdividing, including notice to the public and a public hearing. Thus, the HPRB hearing cannot proceed on May 23. Moreover, as further set forth below, Perseus cannot satisfy the pertinent legal requirements.

Compl. ¶ 41 (App. A0024-25); (Compl. Ex. 3 (May 6 Submission) at 4) (App. A0070).

A mere four days later, the HPO issued the May 10 HPO Report (Compl. Ex. 4) (App. A0102). Without referencing the April 30 HPO Report, or acknowledging it in any way, the HPO shockingly reversed its previous position and proposed a completely different eastern boundary for the Temple Landmark Site than the HPO had confirmed a scant 10 days earlier. In an obvious pandering to the developer,[9] the May 10 HPO Report found that the eastern

[9] Discovery confirmed these allegations. On May 1, 2019, an email chain among the Project's opponents concluded that the Project could not proceed with the April 30 HPO Report's boundary determination because it would entail subdivision of an historic landmark site and require a public hearing before the Mayor's Agent. That email was forwarded to Appellee Trueblood (head of the Office of Planning) on May 1, 2019, and subsequently distributed to the HPO staff. *See* Deposition of Kim Williams dated Dec. 18, 2019) ("Williams Dep.") at 101, 110 and Ex. 10. Then on May 6, the more formal submission referenced above was made to the HPRB. After the May 1 email and possibly also after the May 6 Submission, Steve

boundary of the Temple Landmark Site was the no longer extant Lot 800, whose eastern boundary was only a few feet from the back of the Temple. This boundary would permit Perseus to develop the Project without having to meet the *landmark* subdivision requirements, which are much stricter than the *historic district* subdivision requirements, and without holding a public hearing before the Mayor's Agent subject to DCAPA requirements. The May 10 HPO Report even contradicts the Office of Planning's own map published on its website, which has always shown and continued to show as of the Complaint's filing date that the Temple Landmark Site boundaries are those shown in the April 30 HPO Report. Compl. ¶ 42 (App. A0025-26).

The May 10 HPO Report did not address the Preservation Act's language. Rather, the sole basis for its conclusion that the Temple Landmark

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Callcott (the HPO official in charge of the Luxury Project) approached Tim Denee (an HPO staffer with experience in boundary determinations) and Appellee David Maloney (head of the HPO), and told them that the developer wanted to "subdivide the property" of the Temple on the "back boundary of the lot on which the temple was built" (only a few feet from the back of the Temple). Deposition of Tim Denee dated January 28, 2020 ("Denee Dep.) at 94, 97. Thereafter, Maloney removed Kim Williams (the well-respected author of the April 30 HPO Report) from any further involvement, and proceeded to prepare the revised May 10 HPO Report himself embracing the Lot 800 boundary the developer had requested. Williams Dep. at 107; Deposition of David Maloney dated January 30, 2020 ("Maloney Dep.") at 35-36. Thereafter, at the May 23 hearing, Maloney advised the HPRB that the new boundary determination was *not* subject "to review by the [M]ayor's [A]gent." May 23 HPRB Hearing Trans. at 45 (Ex.1 to District's Motion to Dismiss).

Site boundary should be drawn a few feet from the back of the Temple was the unexplained contention that:

> Logically, boundaries should reflect the extent of the property at the time of the Temple's completion in 1915, which was Assessment and Taxation Lot 800. Lots 40-42 (purchased 1920), 105 (1921), 106 (1952), 28 (1954) and 29 (1963) were acquired by the Scottish Rite in later years, as noted. . . .

May 10 HPO Rep. at 5 (Compl. Ex. 4) (App. A0106); Compl. ¶ 43 (App. A0026). For this purpose, the May 10 HPO Report adopted the old Lot 800 boundaries, which no longer existed when the Preservation Act was passed in 1978. *Id.*

The Complaint alleges that the District's adoption of Lot 800, instead of Lot 820, as the boundary of the Temple Landmark Site violates the Act and its accompanying regulations. Among other things, the Complaint asserts that under the unambiguous language of the Act and pertinent principles of statutory construction, the site of a landmark is the lot on which the landmark sits when the landmark is added to the DC Inventory of Historic Sites, which was established in 1978, and seeks a declaratory judgment to that effect. Compl. ¶¶ 70-79 (App. A0033-34). The conclusion that Lot 820 is the boundary of the Temple Landmark Site is the same conclusion that Joint Commission reached (*see* Section IV.D) and that the HPO embraced in the April 30 HPO Report, prior to the developer's intervention. Compl. ¶¶ 73, 75

(App. A0033-34).[10] Indeed, the District's illogical conclusion that the site of the Temple Landmark is Lot 800, which did not exist when the Temple Landmark was added to the DC Inventory of Historic Sites in 1978, was nothing more than pandering to the developer. Compl. ¶ 76 (App. A0034); *see supra* n.9. Even more shocking, it constituted *a blatant attempt to deprive Dupont East Citizens and others of their statutory due process right* to a public hearing before the Mayor's Agent subject to DCAPA procedural protections. Such a public hearing is required only if there is a subdivision of an *historic landmark*, as opposed to "subdivision of a lot in an historic district." D.C. Code § 1106(c). By reducing the Temple Landmark to Lot 800, the Project would not require subdivision of an historic landmark and thus avoided a public hearing before the Mayor's Agent.

Further, the Complaint asserts, among other things, that the District's designation of Lot 800 as the Temple Landmark Site violates the Equal Protection Clause. The Complaint alleges that the District applied unprecedented and illogical criteria that it had never previously applied in

[10] Discovery has verified that, contrary to the District's revised determination in the May10 Report that the developer instigated, the Joint Committee's designation of that Sixteenth Street Historic District boundary to include Lot 820 "acknowledged by implication that Lot 820 was also the site of the historic landmark designation for the temple." Additional Information on Historic Property Boundaries at 5. Mayor's Agent Hearing, Hays Ex. 7 (available at https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/Hays%20Exhibits%20-%20Mayor%27s%20Agent%20Hearing.pdf.

other instances to permit the Project to proceed. Compl. ¶ 111 (App. A0040).[11] Indeed, the District's adoption of Lot 800, which no longer existed when the HPRB selected it as the Temple Landmark Site boundary, violates the very guidance that it said it relies upon, the National Register Bulletin.[12]

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[11] The District's own admissions confirm that it had never previously applied the Preservation Act in this fashion. Appellants' Interrogatory No. 18 requested the District of Columbia government to: "Identify each historic landmark within the District of Columbia where the site of the landmark as designated in the D.C. Inventory (i) consisted of the lot upon which the historic landmark sat at the time of its construction but (ii) was different from the lot upon which it rested at the time of its designation in the D.C. Inventory, by providing the name and address of the landmark, the lot upon which it sat when constructed, and the lot upon which it sat when entered into the D.C. Inventory." The response of the District of Columbia government was as follows:

> This Interrogatory is overbroad and unduly burdensome because it seeks to have the District conduct research. Subject to the General Objections and the foregoing objection, the District responds: *HPO staff do not recall any instances of such cases*.

District's Supp. Responses to Plaintiffs' First Set of Interrogatories, dated Oct. 23, 2019, at 13 (emphasis added). The April 30 HPO Report (at 1) (Comp. Ex. 2) (App. A0060) confirms this response, as it noted that the site of a landmark is "commonly interpreted as the lot where the building is situated" at the time of its designation. Thus, the District had *never before* treated the boundaries of any Historic Landmark — any historic resource that in the course of their work they are supposed to protect — in the way that they treated the Temple Site boundary after the Masons and Perseus proposed their development project.

[12] The HPRB and the HPO espouse that they both "follow the guidance established by the National Register in delineating the boundaries of historic landmarks and districts." Denee Dep. at 26 l:1-9. The National Register Bulletin, in directing that the applicable agency use the current legal boundaries of a landmark site when establishing the boundary, provides as follows:

> **Current Legal Boundaries:** *Use the legal boundaries of a property as recorded in the current tax map* or plat accompanying the deed

H. The District Improperly Evaluated DECAA's Application To Increase the Temple Landmark Boundary.

The HPO addressed DECAA's petition to expand the Temple Landmark Site boundary (Compl. Ex. 8) (App. A0116) in its April 30 (Compl. Ex. 2) (App. A0060) and May 10 (Compl. Ex. 4) (App. A0102) Reports. Compl. ¶ 128 (App. A0045-46). There were numerous flaws in the HPO analysis, upon which the HPRB relied in denying DECAA's application. Compl. ¶¶ 126-130 (App. A0045-46). Among other things, the District wrongly concluded that it is "impossible to conjecture about what Pope wished for the Scottish Rite site. What is known is that he designed the building on a site hemmed in by rowhouses and streets. Whatever his preferences, he presumably designed the building within those constraints and not with the expectation that those buildings would be removed in the future to enhance views." Compl. ¶ 128 (App. A0045-46).

Undisputed facts in the record before the trial court belie this contention. First, although the District admitted Pope modeled the Temple after the tomb of

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> when these boundaries encompass the eligible resource and are consistent with its historical significance and remaining integrity.

National Register Bulletin, Defining Boundaries for National Register Properties ("National Register Bulletin") at 3 (emphasis added) (available at https://www.nps.gov/subjects/nationalregister/upload/Boundaries-Completed.pdf). Obviously, the National Register Bulletin's exhortation to use "Current Legal Boundaries" is the *direct opposite* of the HPRB and HPO's conclusion that "Logically, boundaries should reflect the extent of the property at the time of the Temple's completion in 1915[.]" May 10 HPO Report (Compl. Ex. 4) at 5 (App. A0106)); *see* HLRB Actions dated May 23, 2019 (Compl. Ex. 1) (App. A0058).

Mausolus,[13] it utterly failed to recognize that every rendition of the tomb shows that it is surrounded by open space, not crowded by a five-story building that blocks the view of it.[14] Second, the intricate design of the Temple' apse is powerful circumstantial evidence, which the District wholly failed to consider, that Pope intended unencumbered views of the Temple apse. Third, the Masons began acquiring the area east of the Temple shortly after the construction of Temple, and began to raze the houses. The Masons' actions again provide powerful circumstantial evidence, unaddressed by the District, that the intent was to provide unencumbered view of the Temple. Compl. ¶¶ 20, 128 (App. A0017, A0045-46).

I. The May 23 HPRB Hearing.

Despite objections to proceeding, the HPRB conducted the hearing on May 23. As noted above, the notice for the hearing failed to provide any notice, let alone adequate notice, of the District's intent to reduce the boundary of the Temple Landmark Site. Compl. ¶ 97 (App. A0038). Further, in its decision resulting from the hearing, the HPRB did not address the statutory interpretation issues or HPO's unexplained reversal in position, but merely parroted the May 10 HPO Report. Compl. ¶¶ 45-49 (App. A0027).

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[13] *See* Nov. 29 HPO Rep. at 1 (App. A0200).

[14] *See* https://www.google.com/search?q=tomb+of+mausolus+at+halicarnassus&source=lnms&tbm=isch&sa=X&ved=0ahUKEwjprd799LLkAhVMtZ4KHXedA4wQ_AUIESgB&biw=1280&bih=614#spf=1567453951600.

J. Appellants' Complaint and the District's Subsequent Procedural Gambits.

On June 26, 2019, Dupont East Citizens filed a Complaint for Declaratory and Injunctive Relief in the Superior Court of the District of Columbia. (App. A0010). The District then engaged in a series of pretextual litigation-inspired procedural moves in an attempt to mask its violations.

First, even though the HPRB had already approved the subdivision, apparently fearing an infirmity in the initial hearing, it scheduled another hearing *on the same subdivision* for September 26, 2019.[15] Not surprisingly, the HPRB again approved the subdivision in virtually identical language as "compatible with the landmark and the 16th Street and the 14th Street historic districts."[16]

Second, in a bizarre twist, even though the Masons/Perseus had obtained HPRB approval for the subdivision and no Mayor's Agent hearing was required because of the revised boundary determination, the Masons requested a hearing before the Mayor's Agent. This is the equivalent of a party prevailing in Superior Court, and then filing an appeal.

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[15] *See* HPRB Public Notice for September 26, 2019 Hearing (available at https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/HPO%20Monthly%20Public%20Notice%2009%202019.pdf).

[16] HPRB Actions for September 26 and October 3, 2019 (available at https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/HPRB%20ACTIONS%20September%2026%20and%20October%203%202019.pdf). The HPRB did not, however, revisit the issue of the Temple Landmark boundaries.

K. The Mayor's Agent Hearing.

On February 7, 2020, the Mayor's Agent held a hearing at the request of the Masons/Perseus. The hearing addressed only the issue of the HPRB's determination that the proposed subdivision met the "necessary in the public interest" requirements of the Preservation Act, the sole issue within the jurisdiction of the Mayor's Agent. D.C. Code § 6-1106(e). The Mayor's Agent confirmed that he had no jurisdiction to review the HPRB's boundary determination, and directed the parties to "*take that up in your lawsuit"* for resolution of that issue. *See* Transcript of Hearing before the Mayor's on February 7, 2020 ("Mayor's Agent Trans.") at 13 (App. A0302) (emphasis added).

L. The Trial Court's Dismissal.

On March 2, 2020, almost a month after the Mayor's Agent hearing, the trial court dismissed all the claims without prejudice.

V. SUMMARY OF ARGUMENT

While it is somewhat unclear (*see supra* Section III) from the language in the trial court's Order, it could be construed as dismissing the Complaint on three separate grounds. Each of those potential grounds is misguided.

First, to the extent that the trial court concluded it had no subject matter jurisdiction over the claims in the Complaint, that conclusion was incorrect. The Superior Court "has jurisdiction of any civil action or other matter (at law or in

equity) brought in the District of Columbia," unless jurisdiction is vested exclusively in a federal court. D.C. Code § 11–921(a) (2001). Jurisdiction is not vested in the federal court over any claim asserted in the Complaint.

Second, to the extent the trial court appeared to conclude that Dupont East Citizens had failed to exhaust unspecified administrative remedies, that conclusion was likewise erroneous. The imposition of an "exhaustion" requirement requires at a minimum the existence of a pertinent and adequate administrative remedy. *Washington Gas Light Co. v. Pub. Serv. Comm'n of District of Columbia*, 982 A.2d 691, 700-01 (D.C. 2009).

A proceeding before the Mayor's Agent does not meet this requirement. It offers no such administrative remedy for the Complaint's claims. HPRB's determination that the Temple Landmark Site boundary was the 1915 Lot 800, rather than Lot 820, and HPRB's misconduct in making that determination is central to Dupont East Citizens' Complaint. However, the Mayor's Agent has no authority to address the issue of the Temple Landmark Site boundaries. Indeed, at the hearing, the Mayor's Agent confirmed that he had no such authority and directed the parties to take up that issue in this lawsuit. *See* Mayor's Agent Hearing Trans. at 13 (App. A0302). To the extent the trial court might have been referring to the HPRB, those administrative proceedings were complete when the Order was entered. Indeed, the Complaint challenged those proceedings.

Third, the trial court erred in ruling that the Mayor's Agent had primary jurisdiction over Dupont East Citizens' claims. Primary jurisdiction is inapplicable for multiple reasons. Among other things, where the administrative agency does "not have the authority to adjudicate the dispute," between the administrative agency and the plaintiff, primary jurisdiction does not "operate to bar his complaint[.]" *Goode v. Antioch Univ.*, 544 A.2d 704, 707 (D.C. 1988).

The trial court seemingly suggested that both the HPRB and the Mayor's Agent had primary jurisdiction over Dupont East Citizens' claims. With respect to the Mayor's Agent, as established above in the context of the exhaustion of administrative remedies, he had no jurisdiction to adjudicate any of these claims. Each of those claims asserted either constitutional violations, statutory violations, or challenged the HPRB's process and determination of the Temple Landmark Site boundaries or the HPRB's approval of the conceptual design. None of the claims challenged the approval of the subdivision on the basis that it did not satisfy the Act's requirements that the subdivision be "necessary in the public interest," the sole issue within the jurisdiction of the Mayor's Agent. D.C. Code § 6-1106(e).

Similarly, the trial court's ruling with respect to the HPRB's purported primary jurisdiction is likewise erroneous. Dupont East Citizens had already litigated the issues as to which the HPRB had jurisdiction at the time the trial court ruled, and thus any primary jurisdiction requirement had already been satisfied.

Moreover, primary jurisdiction does not apply where the issue "lay outside the expertise of the" administrative agency[.]" *District of Columbia v. District of Columbia Pub. Serv. Comm'n*, 963 A.2d 1144, 1154 (D.C. 2009). Here, the constitutional, statutory, and regulatory violations and the statutory interpretation claims are not "within the special competence of" District agencies; rather, they are quintessential judicial claims that courts routinely resolve. Thus, even if the HPRB or the Mayor's Agent could entertain constitutional claims, which they cannot, such claims would not lie within their primary jurisdiction. Further, with respect to the boundary and conceptual review issues to which primary jurisdiction does not apply because the HPRB had already ruled upon them, the Mayor's Agent likewise has no expertise. Boundary determination "issues do not come before the mayor's agent at all." Mayor's Agent Hearing Trans. at 13 (App. A0302). And the Mayor's Agent has no expertise regarding conceptual design approval claims. As in the case of boundary determinations, the Mayor's Agent has no authority to address those claims. *See* DC Code § 6-1108(c).

VI. ARGUMENT

A. Standard of Review

The trial court dismissed the Complaint principally on the grounds of primary jurisdiction, but also in a passing one sentence comment also appeared to

conclude that it lacked subject matter jurisdiction,[17] an argument that the District did not assert in its motion papers.[18] The standard of review for the grant of a Rule 12(b)(1) motion for lack of subject matter jurisdiction "is *de novo* because 'the issue of subject matter jurisdiction is a question of law.'" *Pardue v. Cntr. City Consortium Sch. of Archdiocese of Washington, Inc.*, 875 A.2d 669, 674-75 (D.C. 2005) (citation omitted). A "facial" attack on subject matter jurisdiction, such as that presented here, requires this court "to determine jurisdiction by looking only at the face of the complaint and taking the allegations in the complaint as true." *Heard v. Johnson,* 810 A.2d 871, 877-78 (D.C. 2002). The trial court mistakenly assumed that it "'was free to weigh the evidence without any presumption regarding its truthfulness.'" Order at 6 (App. A0309).

The trial court also erroneously appeared to believe that the determination of whether primary jurisdiction existed was reviewable under the standards applicable

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[17] *See* Order at 9 (App. A0312) ("this Court also lacks jurisdiction generally because review of historic preservation matters has been placed within the specialized competence of the HPRB in the first instance, then the Mayor's Agent, and then the D.C. Court of Appeals."

[18] Although the District recited Rule 12(b)(1) as the basis for its motion to dismiss with respect to jurisdiction, it misguidedly appeared to believe that this standard was applicable to a motion to dismiss on primary jurisdiction grounds. *See United States v. Lahey Clinic Hosp., Inc.,* 399 F.3d 1, 18 (1st Cir. 2005) (primary jurisdiction "invokes prudential doctrines, and 'does not implicate the subject matter jurisdiction'"); *Syntek Semiconductor Co. v. Microchip Tech. Inc.,* 307 F.3d 775, 780 (9th Cir. 2002) (same). Since the District made no argument with respect to subject matter jurisdiction, Dupont East Citizens had no opportunity to address that issue in their brief.

to a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. *See* Order at 6 (App. A0309); *see also supra* n.18. To the contrary, the Superior Court's determination "whether to defer its authority in favor of an agency's determination applying principles of primary jurisdiction is ordinarily reviewed for abuse of discretion." *District of Columbia Pub. Serv. Comm'n*, 963 A.2d at 1153.

B. The Trial Court Erred In Concluding It Had No Subject Matter Jurisdiction Over Appellants' Claims.

The Superior Court is "a court of general jurisdiction." *Andrade v. Jackson,* 401 A.2d 990, 992 (D.C. 1979)*; see Begum v. Auvongazeb*, 695 A.2d 112, 114 (D.C. 1997) (same). It "has jurisdiction of any civil action or other matter (at law or in equity) brought in the District of Columbia," unless jurisdiction is vested exclusively in a federal court. D.C. Code § 11–921(a) (2001). Jurisdiction over none of the claims asserted in the Complaint is vested exclusively in a federal court. Thus, the Superior Court had subject matter jurisdiction over all Dupont East Citizens' claims.

The trial court's apparent conclusion that it had no subject matter jurisdiction also defies logic. Despite being a court of general jurisdiction, in finding that it had no subject matter jurisdiction over Dupont East Citizens' claims, the trial court stated:

> [T]his Court also lacks jurisdiction generally because review of historic-preservation matters has been placed within the specialized

> competence of the HPRB in the first instance, then the Mayor's Agent, and then the D.C. Court of Appeals.

Order at 10 (App. A0313), citing *Kingman Park Civic Ass'n v. Gray*, 27 F. Supp. 3d 142, 164 (D.D.C. 2014). *First,* this assertion is clearly wrong as to the constitutional claims, none of which were placed "within the specialized competence of the" HPRB or the Mayor's Agent. *Id.* Indeed, the Preservation Act is wholly silent as to any jurisdictional grant to the HPRB or the Mayor's Agent to address constitutional issues. *See* D.C. Code 6-1101 *et seq*.

Second, and more generally, the HPRB's jurisdiction is severely circumscribed to a narrow set of historic preservation issues, in this case the propriety of a subdivision. *See* 6 D.C. Code § 1101 *et seq.* The Complaint did not challenge the HRPB's conclusion that the proposed subdivision met the Act's requirements that the subdivision was "necessary in the public interest." D.C. Code § 6-1106(e). *Third,* the Act circumscribes the Mayor's Agent's jurisdiction even more narrowly, as he only has jurisdiction over certain HPRB decisions. *See, e.g.,* D.C. Code § 6-1108(c); 10C DCMR § 400 (limiting the Mayor's Agent's authority to making the "final determination on the approval or denial of applications for demolition, alteration, new construction, and subdivision subject to the certain specified provisions of the Act.").[19] Again, the Complaint did not

[19] *Kingman*, a federal district court decision upon which the trial court exclusively relied in determining that it had no subject matter jurisdiction, actually supports the

challenge the HRPB's conclusion that the proposed subdivision met the Act's requirements that the subdivision was "necessary in the public interest" because that issue was within the Mayor's Agent's jurisdiction.

C. The Trial Court Erred in Concluding That There Existed Administrative Remedies That Appellants Were Required To Exhaust Before Filing Their Complaint in Superior Court.

In the Order, again in a one line comment, the trial court appeared to conclude that Dupont East Citizens had failed to exhaust unspecified administrative remedies, despite their Constitutional Claims and despite the District's failure to argue exhaustion. *See* Order at 10 (App. A0313).[20] In any event, the trial court erred in making this sua sponte and unsupported determination.

As this Court has recognized, "there are several "distinct legal concepts" that go by the name of "exhaustion," including "prudential" exhaustion and "statutory" exhaustion. *Washington Gas Light*, 982 A.2d at 700-01. Whether statutory or prudential, however, "exhaustion" requires the existence of a pertinent and

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assertion of subject matter jurisdiction. The *Kingman* court, far from concluding that it had no subject matter jurisdiction over the equal protection constitutional claim asserted therein, comprehensively addressed and ruled on the substance of that claim. *Id.,* 27 F. Supp. 3d at 158-62.

[20] As in the case of subject matter jurisdiction, the District failed to argue that Dupont East Citizens had not exhausted their administrative remedies. Consequently, they had no opportunity to address that issue.

adequate administrative remedy. *Id.; see also Nat'l Treasury Employees Union v. King,* 961 F.2d 240, 243 (D.C. Cir.1992) (for exhaustion to apply in the context of constitutional claims, the "statutory and constitutional claims [must be] 'premised on the same facts' and 'the administrative process [must be] fully capable of granting relief[.]'") (citations omitted). Further, as the trial court recognized, contrary to primary jurisdiction, "[e]xhaustion applies where a claim is cognizable in the first instance by the administrative agency alone[.]" *District of Columbia Dept. of Pub. Works v. L.G. Indus., Inc.*, 758 A.2d 950, 955 (cited in Order at 7).

A proceeding before the Mayor's Agent did not meet these requirements.[21] *First,* such a proceeding offered no such administrative remedy for the claims asserted in the Complaint. HPRB's determination that the Temple Landmark Site boundary was the 1915 Lot 800, rather than Lot 820 and HPRB's misconduct in making that determination is central to Dupont East Citizens' Complaint.[22]

[21] Presumably the trial court's exhaustion statement referred to a proceeding before the Mayor's Agent, as the proceedings before the HPRB had been completed long before the trial court's ruling and the Complaint challenged those proceedings.

[22] *See* Compl. ¶¶ 70-79 (First Claim, seeking a declaratory judgment that the Temple Landmark Site is Lot 820); ¶¶ 80-84 (Second Claim), ¶¶ 95-102 (Fourth Claim) (asserting that the District violated the Act and Appellants' due process rights, by, among other things, failing to provide adequate notice that it intended to consider a reduction in the boundary of the Temple Landmark Site); ¶¶ 103-108 (Fifth Claim) (asserting that HPRB's boundary determination violated retroactivity prohibition); ¶¶ 109-115 (Sixth Claim) (asserting that HPRB boundary determination violated equal protection of the laws); ¶¶ 117-124 (Seventh Claim) (asserting that the District's adoption of the 1915 Lot (Lot 800) as the Temple Landmark Boundary was arbitrary and capricious); and ¶¶ 125-132 (Eighth Claim)

However, the Mayor's Agent has no authority to address the issue of the Temple Landmark Site boundaries.[23] Indeed, at the hearing, the Mayor's Agent directed the parties to take up that issue in this lawsuit:

> MR. HAYS: . . . .My third ground is misconduct on the part of the HPO and the HPRB in revising their boundary issue.
>
> MR. BYRNE: That's not before me. *You have to take that up in your lawsuit. I don't rule on the setting of the -- I don't rule on the setting of a landmark site*. Designation issues do not come before the mayor's agent at all.

Mayor's Agent Hearing Trans. at 13 (App. A0302) (emphasis added).[24] Further, the Complaint challenges the HPRB's approval of the conceptual design of the

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(asserting that District's rejection of the petition to extend the Temple Landmark Site boundary was arbitrary and capricious). App. A0033-50.

[23] In addition, the Constitutional Claims were not "premised on the same facts" as the claims in the HPRB or Mayor's Agent administrative proceedings. The Constitutional Claims alleged, among other things, that the Dupont East Citizens' due process rights and right to equal protection of the laws were violated, and were premised on lack of notice, the misconduct of the HPRB, and the its failure to apply the Act to Dupont East Citizens in the same manner it had previously applied the Act to others. *See* Compl. ¶¶ 95-102 (due process claim) (App. A0038-39); ¶¶ 103-108 (retroactivity claim) (App. A0039-40); and ¶¶ 109-116 (equal protection claim) (App. A0040-41). The administrative proceedings, by contrast, addressed a narrow set of issues regarding whether the subdivision would be "necessary in the public interest." DC Code § 6-1106(e). *See* DC Code §§ 6-1102(a)(10) (defining "necessary in the public interest" as "consistent with the purposes of this act"); 6-1101(b) (setting forth narrow purposes of the Act).

[24] Appellants respectfully request that this Court take judicial notice of this excerpt. There is no dispute as to the Hearing Officer's statement and his declination to consider the boundary issue. Further, it is germane to this proceeding and this Court may consider such evidence. *See, e.g., Wise v. Glickman*,257 F. Supp. 2d 123, 130 n.5 (D.D.C. 2003) (court is "allowed to take judicial notice of matters in

Luxury Project as arbitrary and capricious.[25] However, the Act provides that the Mayor's Agent "shall not determine compliance with sections 5, 6, 7, or 8 based on an application for conceptual review[.]" DC Code § 6-1108(c). Thus, it is apparent that no administrative remedy exists before the Mayor's Agent for Dupont East Citizens' claims.[26] This fact undoubtedly explains why the District never asserted exhaustion before the trial court.

Second, for the same reasons, none of the Complaint's claims were "cognizable in the first instance by the administrative agency alone," as required to establish an exhaustion claim. *L.G. Indus.,* 758 A.2d at 955.

Third, it bears noting that at the time the trial court dismissed the action on March 2, 2020, the hearing before the Mayor's Agent had already been completed on February 7, 2020. App. A301-302. Thus, even if an exhaustion requirement existed, which it did not, Dupont East Citizens satisfied that requirement.

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the general public record, including records and reports of administrative bodies and records of prior litigation"); *S.S. v. D.M.,* 597 A.2d 870, 880 (D.C. 1991) ("a judge may take judicial notice of the contents of court records.") (citing *Mannan v. District of Columbia Bd. of Med.,* 558 A.2d 329, 338 (D.C.1989)); Fed. R. Evid. 201 ("court may take judicial notice at any stage of the proceeding").

[25] *See* Comp. ¶¶ 133-141 (Ninth Claim) (App. A0047-50).

[26] In addition, the Mayor's Agent authority to hear matters arises only if there is an "application." 10C DCMR § 104.4. Here, there was no application to define the boundaries of the Temple Landmark Site.

D. The Trial Court Erred In Concluding That the Mayor's Agent Had Primary Jurisdiction Over Appellants' Claims.

The trial court erred in ruling that the Mayor's Agent had primary jurisdiction over Dupont East Citizens' claims. Primary jurisdiction is a discretionary doctrine that permits a court under certain limited circumstances to defer ruling until an administrative agency has addressed the topic:

> Under the doctrine of primary jurisdiction, when a claim *is originally cognizable* in the courts but requires resolution of an issue *within the special competence of an administrative agency*, the party must first resort to the agency before he or she may sue for an adjudication. Although the doctrines often overlap, the doctrine of primary jurisdiction should not be confused, as it was by appellee here, with the doctrine of exhaustion of administrative remedies.

Drayton v. Poretsky Mgmt., Inc., 462 A.2d 1115, 1118 (D.C. 1983) (emphasis added). "The doctrine of primary jurisdiction "'should be invoked sparingly,'" as it often results in "delay." *Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Norton*, 527 F. Supp. 2d 130, 136 (D.D.C. 2007) quoting *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988) (citation omitted); *APCC Serv., Inc. v. WorldCom, Inc.*, 305 F. Supp. 2d 1, 13 (D.D.C. 2001) (same). "[U]niformity of result and application of specialized and expert knowledge" are the necessary factors that "warrant invocation of the doctrine of primary jurisdiction. *Id.* As the Supreme Court stated:

> [I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative

> discretion, agencies created by Congress for regulating the subject matter should not be passed over.

Far East Conference v. United States, 342 U.S. 570, 574 (1952); *see D.C. Water & Sewer Auth. v. Delon Hampton & Assocs.,* 851 A.2d 410, 417 (D.C. 2004) (same).

Here, primary jurisdiction is inapplicable for four reasons. *First*, where the administrative agency does "not have the authority to adjudicate the dispute," between the administrative agency and the plaintiff, primary jurisdiction does not "operate to bar his complaint[.]" *Goode*, 544 A.2d at 707. The trial court seemingly suggested that both the HPRB and the Mayor's Agent had primary jurisdiction over Dupont East Citizens' claims. With respect to the Mayor's Agent, as established above in the discussion of exhaustion of administrative remedies, he had no jurisdiction to adjudicate any of these claims. Each of those claims (i) asserted either constitutional or statutory violations, or (ii) challenged the HPRB's process and determination of the boundary of the Temple Landmark Site or its approval of the conceptual design. *See supra* n.22. None of the claims challenged the approval of the subdivision on the basis that it did not satisfy the Act's requirements that the subdivision be "necessary in the public interest," the sole issue within the jurisdiction of the Mayor's Agent. D.C. Code § 6-1106(e).

The trial court's ruling with respect to the HPRB's purported primary jurisdiction is even more inexplicable. Dupont East Citizens had already litigated the issues as to which the HPRB had jurisdiction at the time the trial court ruled,

and thus any requirement regarding primary jurisdiction had already been satisfied. Indeed, Dupont East Citizens' sought review judicial review in the trial court of the HPRB's actions that, as established above, could *not* be heard by the Mayor's Agent. In any event, the Act likewise does not provide the HPRB with any authority to adjudicate constitutional, statutory, or regulatory violations. Its sole subject matter jurisdiction, in the context of the Complaint' claims, was limited to determining the boundary of the Temple Landmark Site and whether the Luxury Project should receive conceptual design approval. The trial court erred in dismissing claims relating to those issues on primary jurisdiction grounds because the HPRB had already adjudicated those issues. Moreover, those issues were in any event not "originally" cognizable by a court, as required to invoke primary jurisdiction. *Drayton*, 462 A.2d at 1118. Indeed, while the Complaint asserts claims regarding the HPRB's rulings with respect to the "clarification" of the boundary, the rejection of the petition to extend the Temple Landmark Site boundary, and the approval of the Project's design, the HPRB's consideration of those issues was completed before the trial court ruled, challenged in the Complaint, and those decisions are now subject to court review.[27]

[27] While the HPRB has authority to determine whether the application for subdivision of the Temple Landmark Site met the Act's requirements, as noted above, Dupont East Citizens did not challenge this approval in this lawsuit on the grounds that the HPRB's approval erroneously concluded that the Act's

Second, primary jurisdiction does not apply where the issue "lay outside the expertise of the" administrative agency[.]" *District of Columbia Pub. Serv. Comm'n*, 963 A.2d at 1154. The constitutional, statutory, and regulatory violations and the statutory interpretation claims are not "within the special competence of" District agencies; rather, they are quintessential judicial claims that courts routinely resolve. *See*, *e.g.*, *Hobbs v. Hawkins*, 968 F.2d 471, 479 (5th Cir. 1992) (whether agency can entertain constitutional claims, "such claims would not fall within [its] primary jurisdiction."); *Hamad v. Nassau County Med. Cntr.*, 191 F. Supp. 2d 286, 298 (E.D.N.Y. 2000) (primary jurisdiction "does not require the Court" to refrain "from hearing Plaintiff's constitutional claims"); *Assiniboine*, 527 F. Supp. 2d at 136 (rejecting primary jurisdiction where plaintiffs' claims "requires analysis of trust and administrative law principles 'within the conventional competence' of the district court.'"). Thus, even if the HPRB or the Mayor's Agent could entertain constitutional claims, which they could not, such claims would not lie within their primary jurisdiction. As the Supreme Court stated in addressing a similar issue:

> The courts below, of course, possessed jurisdiction over respondents' constitutional challenges. Whether or not the [agency] entertains constitutional claims . . . such claims would not fall within the [agency's] primary jurisdiction.

Communications Workers of Am. v. Beck, 487 U.S. 735, 743 n.1 (1988).

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requirements were met. Rather, they challenged this determination before the Mayor's Agent.

Further, with respect to the boundary and conceptual review issues to which primary jurisdiction does not apply because the HPRB had already ruled upon them, the Mayor's Agent likewise has no expertise. Boundary determination "issues do not come before the mayor's agent at all." Mayor's Agent Hearing Trans. at 13 (App. A0302). And the Mayor's Agent has no expertise regarding conceptual design approval claims. As in the case of boundary determinations, he has no authority to address those claims. *See* DC Code § 6-1108(c).

Third, where an "issue is certainly within the competence of the Superior Court . . . the doctrine of primary jurisdiction does not apply to it." *Robinson v. Edwin B. Feldman Co.* 514 A.2d 799 (D.C. 1986). Here, the Superior Court routinely addresses claims such as those asserted in the Complaint. With respect to the constitutional claims, the Superior Court's familiarity with such claims, as a court of general jurisdiction, is indisputable. With respect to the claims regarding the District's statutory violations, those likewise are the meat and potatoes of the Superior Court as a court of general jurisdiction.

The claims challenging the HPRB's actions as arbitrary and capricious were also well within the Superior Court's competence. Those HPRB proceedings were not a "contested case" within the DCAPA provision granting this Court exclusive

jurisdiction,[28] and the Superior Court often reviews agency action under DCAPA standards. *See, e.g., Kegley v. District of Columbia,* 440 A.2d 1013, 1018 (D.C. 1982) ("we now hold that the scope of review in the Superior Court of a decision made by the [agency in a non-contested case] is the same as this court's scope of review of a contested case under the DCAPA"); *District of Columbia v. King,* 766 A.2d 38, 44 (D.C. (2001) (same).

Fourth, courts routinely reject primary jurisdiction referrals where it would engender further delay. *See, e.g., Goode*, 544 A.2d at 706 ("'the Supreme Court

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[28] Although Appellants' Eighth Claim, challenging the HPRB's rejection of DECAA's application to extend the Temple Landmark Site, would previously have been a "contested case under a 1998 amendment to the Act, a subsequent 2000 amendment eliminated that provision. In this regard, the 1998 amendment to DC Code § 5-1012(b) (now codified as Section 6-1112(b) included, in relevant part, the following additions and revisions to subsection (b):

> All proceedings pursuant to this subchapter shall be conducted in accordance with the applicable provisions of [the Administrative Procedure Act]. *The hearing by the Review Board upon the filing of an application to designate a historic landmark shall be conducted under the contested case procedures contained in [the Administrative Procedure Act]. Any final order of the Mayor under this subchapter and any final order of the Review Board regarding the designation of a historic landmark shall be reviewable in the District of Columbia Court of Appeals.*

D.C. Code § 5–1012(b) (1998 Supp.) (emphasis added), *amended and recodified at* D.C. Code § 6–1112(b) (2008 Repl.). The statute was then further amended in 2000. This 2000 amendment eliminated both the second and third sentences of subsection (b) (i.e., all of the italicized language above), thus eliminating the provision that such applications to designate an historic landmark, which forms the basis of the Eighth Claim, is a "contested case." *See Capitol Hill Restoration Soc. v. District of Columbia Mayor's Agent for Historic Preservation,* 44 A.3d 271, 275-76 (D.C. 2012).

does not require litigant "'to suffer substantial delay that results from application of primary jurisdiction doctrine if it believes that the agency can provide only limited assistance to a court that otherwise has the power and the competence to resolve a dispute'"); *Gulf Oil Corp. v. Federal Power Comm'n*, 128 F. Supp. 446, 449 (D.D.C. 1955) (justiciable issue where "delay [of] determination of an issue as to practically oust such companies from their remedies").[29] Here, there is an urgent need for the trial court to resolve this case before construction proceeds.

The trial court's reliance on *L.G. Industries*, the only case it specifically cites in support of its primary jurisdiction conclusion, was misplaced. In that case, the trial court had enjoined proceedings before the Board of Zoning Appeals ("BZA") that the District had instituted to resolve the issue of whether L.G.'s certificate of occupancy was valid. This Court determined that the trial court had erred in enjoining the BZA proceeding because the BZA had primary jurisdiction over that issue. This Court so concluded because that determination could turn upon "an interpretation" of a statutory term, "transfer station" within the "framework of the zoning regulations," a matter "'placed within [the] special competence of the

[29] Even if one or more claims were subject to the primary jurisdiction, which Dupont East Citizens dispute, primary jurisdiction is a discretionary doctrine, and given the interrelationship of the claims and the urgent need to resolve this case before the Temple Gardens are jeopardized, it makes no sense to refer some of the claims to the Mayor's Agent. *See B-West Imports, Inc. v. U.S.,* 880 F. Supp. 853, 864 n.15 (C.I.T. 1995) ("given intertwining of issues, it would be a waste" of resources to transfer claim "even if primary jurisdiction lay there"), *aff'd,* 75 F.3d 633 (Fed. Cir. 1996).

BZA.'" *L.G. Indus.*, 758 A.2d at 956. By contrast, in the instant case, the pertinent administrative agency (the HPRB) that occupied the same position in this matter as the BZA in the *L.G.* case, had no jurisdiction over most of the claims, including the Constitutional Claims. Moreover, with respect to the two issues that the HPRB did have jurisdiction, the boundary determination and project conceptual review, the HPRB had completed its review and issued its decisions determining a revised boundary for the Temple Landmark Site and approving the Project's conceptual design. As noted above, in the instant case, the Mayor's Agent, unlike the BZA, had no jurisdiction to address any of the issues in the instant suit.

Finally, even if primary jurisdiction were applicable, which it is not, the trial court "should not [] dismiss[] the claims," but rather "stay[] the case pending the" agency's resolution of the claims. *Joyner v. Sibley Mem. Hosp.*, 826 A.2d 362, 374 (D.C. 2003). *See L.G. Indus.,* 758 A.2d 950 (D.C. 2000) (in cases within the ambit of primary jurisdiction, "the judicial process *is suspended* pending referral of such issues to the administrative body for its views.") (emphasis added) (internal punctuation omitted).

VII. CONCLUSION

For the reasons set forth above, the trial court erred in dismissing this case without prejudice. The trial court's decision should be reversed, and the case remanded.

Respectfully submitted this 19th day of August, 2020.

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ADDENDUM

DC Code § 1101

Purposes (Section 2 of the Preservation Act)

(a) It is hereby declared as a matter of public policy that the protection, enhancement and perpetuation of properties of historical, cultural and aesthetic merit are in the interests of the health, prosperity and welfare of the people of the District of Columbia. Therefore, this act is intended to:

(1) Effect and accomplish the protection, enhancement and perpetuation of improvements and landscape features of landmarks and districts which represent distinctive elements of the city's cultural, social, economic, political and architectural history;

(2) Safeguard the city's historic, aesthetic and cultural heritage, as embodied and reflected in such landmarks and districts;

(3) Foster civic pride in the accomplishments of the past;

(4) Protect and enhance the city's attraction to visitors and the support and stimulus to the economy thereby provided; and

(5) Promote the use of landmarks and historic districts for the education, pleasure and welfare of the people of the District of Columbia.

(b) It is further declared that the purposes of this act are:

(1) With respect to properties in historic districts:

(A) To retain and enhance those properties which contribute to the character of the historic district and to encourage their adaptation for current use;

(B) To assure that alterations of existing structures are compatible with the character of the historic district; and

(C) To assure that new construction and subdivision of lots in an historic district are compatible with the character of the historic district;

(2) With respect to historic landmarks:

(A) To retain and enhance historic landmarks in the District of Columbia and to encourage their adaptation for current use; and

(B) To encourage the restoration of historic landmarks.

* * * * *

D.C. Code § 6-1103

Definitions (Section 3 of the Preservation Act)

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(a)(10) *Necessary in the public interest* means consistent with the purposes of this act as set forth in section 2(b) or necessary to allow the construction of a project of special merit.

* * * * *

D.C. Code § 6-1106

Subdivisions (Section 7 of the Preservation Act).

(a) Before the Mayor may admit to record any subdivision of an historic landmark or of a property in an historic district, the Mayor shall review the application for admission to record in accordance with this section and section 9c, and, for applications that will be submitted to the Historic Preservation Review Board or the Commission of Fine Arts for a public hearing, place notice of the application in the *District of Columbia Register* and on the website for the Historic Preservation Office.

(b) Prior to making the finding on the application for admission to record required by subsection (e) of this section, the Mayor shall refer the application to the Historic Preservation Review Board for its recommendation.

(c) Within 120 days after the Review Board receives the referral, the Mayor shall, after a public hearing, make the finding required by subsection (e) of this section: Provided, that the Mayor may make such finding without a public hearing in the case of a subdivision of a lot in an historic district or a subdivision that assembles land with the lot of a historic landmark if the Review Board advises him that such subdivision is consistent with the purposes of this act.

(d) If the Review Board recommends against granting the application, it shall promptly notify the applicant in writing of its recommendation and the reasons therefor.

(e) No subdivision subject to this act shall be admitted to record unless the Mayor finds that admission to record is necessary in the public interest or that a failure to do so will result in unreasonable economic hardship to the owner.

(f) The owner shall submit at the hearing such information as is relevant and necessary to support his application. In any case in which there is a claim of unreasonable economic hardship, the owner shall comply with the requirements of subsections (f) and (g) of section 5 of this act.

(g) In those cases in which the Mayor finds that the subdivision is necessary to allow the construction of a project of special merit, no subdivision shall be permitted to record unless a permit for new construction is issued simultaneously under section 8 of this act and the owner demonstrates the ability to complete the project.

D.C. Code § 6-1108

Preliminary review; conceptual review (Section 9 of the Preservation Act)

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(c) The Mayor shall not determine compliance with sections 5, 6, 7, or 8 based on an application for conceptual review, but the Mayor may consider the Review Board's recommendation on an application for conceptual review as evidence to support a finding on a related application submitted for review under sections 5, 6, 7, or 8.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of August, 2020, a true and correct copy of the foregoing *Brief for Appellants* and associated *Appendix* was filed with the Clerk of the Court via the appellate efiling system and served on the following via the appellate efiling system:

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